Supreme Court, U.S.
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No. 98-1931

In The

Supreme Court of the United States

OCTOBER TERM, 1999

ARTHUR CALDERON, Petitioner,

v.

ANTHONY CORNELL BEAN, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ANDREA M. MILLER*
NAGELEY & MEREDITH, INC.
8001 Folsom Blvd., Suite 100
Sacramento, CA 95826
(916) 386-8282

ANDREW S. LOVE
LAW OFFICES OF COFFIN & LOVE
301 Pennsylvania Ave.
San Francisco, CA 94107
(415) 920-3705

Counsel for Respondent
ANTHONY CORNELL BEAN

* Counsel of Record

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly determined that the joinder of two wholly unrelated murder cases, in which the evidence was not cross-admissible, where one of the two cases was much weaker than the other, and where the prosecutor improperly argued that the cases reflected Bean's "modus operandi," rendered Bean's trial as to the weaker of the two cases fundamentally unfair.

2. Whether the Court of Appeals properly affirmed the district court's findings that trial counsel rendered ineffective assistance of counsel at the penalty phase of Bean's capital trial by failing to investigate Bean's background and by presenting a disorganized and cursory defense which excluded readily available and highly compelling mitigating evidence.

3. Whether this Court should consider the adequacy of the California Supreme Court's procedural default rules in a case where the claims upon which relief was granted were not procedurally barred.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Anthony Cornell Bean (hereinafter "Bean"), respectfully requests that the Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit affirming in part and reversing in part the judgment of the district court which granted Bean's petition for writ of habeas corpus with respect to his death sentence and denied the petition with respect to Bean's underlying convictions.

The opinion of the Court of Appeals is reported at 163 F.3d 1073 (9th Cir. 1998) and is reproduced and attached as Appendix A to the Petition. In addition, the opinion of the Court of Appeals denying the State's petition for writ of mandamus from the district court's denial of a motion to dismiss on grounds of procedural default is reported at *Calderon v. United States District Court For the Eastern District of California*, 96 F.3d 1126 (9th Cir. 1996).

STATEMENT OF THE CASE

On June 8, 1981, a Sacramento County jury found Bean guilty of: 1) two counts of first degree murder for the deaths of Beth Schatz and Eileen Fox, which were allegedly committed in two separate incidents; 2) assault with a deadly weapon on George Schatz; 3) two counts of burglary; and 4) two counts of robbery. The jury also found that Bean personally used a deadly weapon with regard to the Schatz incident. Robbery-murder and burglary-murder special circumstance allegations as to each murder and a multiple murder special circumstance allegation were found to be true.

On June 19, 1981, following the penalty phase of the trial, the

jury foreman advised the trial court that it was "hopelessly deadlocked" and could not arrive at a verdict as to penalty. CT 1018-1019.[1] The trial court admonished the jury and instructed them to return on Monday, June 22, 1981, for further deliberations. CT 1018. On June 22, 1981, the jury returned a death verdict for the Schatz case and a verdict of life in prison without the possibility of parole for the Fox case. CT 1021-1022. On July 20, 1981, judgment was imposed, and Bean was sentenced to death. CT 1050-1052.

The judgment and sentence were affirmed on appeal on September 19, 1988. *People v. Bean*, 46 Cal.3d 919, 251 Cal.Rptr. 467 (1988).

On July 26, 1990, the district court appointed counsel to represent Bean in federal habeas corpus proceedings. On July 18, 1991, Bean filed a federal petition for writ of habeas corpus in district court. On July 30, 1991, the State filed a motion for summary adjudication which alleged that the petition contained unexhausted claims.

On September 26, 1991, the district court vacated the State's motion for summary adjudication, and remanded the case to state court to exhaust state remedies on the ground that all but one of Bean's claims were unexhausted.[2] Bean filed his first and only petition for writ of habeas corpus in the California Supreme Court on June 1, 1994.

On February 23, 1995, the California Supreme Court denied

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[1] The Clerk's Transcript from the state court proceedings is referenced herein as "CT"; the Reporter's Transcript from the state proceedings is referenced as "RT."

[2] The one exhausted claim was that the joinder of cases violated due process.

Bean's state petition. *See* Appendix C. Although many of Bean's claims were denied on state procedural grounds, ten of them, including penalty phase ineffective assistance of counsel, were addressed and denied on the merits. The California Supreme Court applied an exception to its procedural rules so as not to procedurally bar these ten claims. *See* Appendix C, Order, *citing In re Clark*, 5 Cal.4th 750, 797-98, 21 Cal.Rptr.2d 509, 540-41 (1993).

Bean filed a federal petition for writ of habeas corpus on March 22, 1995. On July 21, 1995, the State filed a motion to dismiss the petition on the ground that the California Supreme Court's denial of the state habeas petition constituted a procedural bar to Bean's claims.

On September 13, 1995, Bean moved for summary judgment on the grounds that joinder of the two murder charges resulted in a fundamentally unfair trial, and that there was insufficient evidence to convict Bean of the Fox murder. On November 6, 1995, the magistrate judge issued its Amended Findings and Recommendations, agreeing that the joinder of the two cases created fundamental unfairness in the trial of the weaker of the two cases--the Fox case--and finding that summary adjudication was appropriate. The magistrate judge recommended the denial of summary adjudication to Bean on the issue of whether joinder of Fox unfairly tainted the convictions in the Schatz case.

On November 17, 1995, the magistrate judge recommended denial of the State's motion to dismiss, finding that the California Supreme Court's denial of the state petition did not constitute an adequate state bar. A copy of these findings is attached to the Petition as Appendix D. The State complains in its Statement of the Case that the magistrate judge refused to apply two decisions that purported to

modify and clarify California's procedural default rules--*In re Clark*, *supra*, and *In re Harris*, 5 Cal.4th 813, 21 Cal.Rptr.2d 373 (1993)--to Bean's state habeas petition "even though it was filed subsequent to both decisions, finding instead that neither case was the law at the time Bean should have raised his claims . . .". Petition for Writ of Certiorari [hereinafter "Petition"], at 6. *Clark* and *Harris* purported to modify and clarify California's procedural default rules. To make this argument, however, the State has to ignore that it conceded at oral argument both before the magistrate judge and the Court of Appeals that Bean's default, if any, would have occurred before *Clark* and *Harris* were decided. *See Calderon v. United States District Court, supra*, 96 F.3d at 1130 & n. 4.

On March 29, 1996, the district court filed an order, a copy of which is found in Appendix E to the Petition, adopting the magistrate judge's findings with regard to the State's motion to dismiss and denying the State's motion.

On May 8, 1996, the district court denied Bean's motion for summary judgment on the issue of joinder, adopting the magistrate judge's findings with regard to the Schatz case and rejecting them with regard to the Fox case.

An evidentiary hearing on several of Bean's claims was held before the magistrate judge beginning on May 20, 1996, and concluding on May 30, 1996. On July 18, 1996, the State filed a petition for writ of mandate and/or prohibition in the Court of Appeals seeking an order directing the district court to vacate its March 29, 1996 order denying the State's motion to dismiss the petition. In an opinion filed on September 20, 1996, the Court of Appeals denied the mandamus petition. *Calderon v. United States District Court, supra.* On November 26, 1996, the

State's petition for rehearing was denied.

On January 23, 1997, the magistrate judge issued detailed findings and recommendations (hereafter "F&R") with regard to the disposition of Bean's habeas corpus petition. The magistrate judge recommended the denial of relief with regard to Bean's guilt phase claims, but recommended the granting of relief with regard to two of Bean's penalty phase claims: Ineffective Assistance of Counsel and Bailiff/Juror Misconduct.

On April 28, 1997, this Court denied the State's petition for writ of certiorari, which sought review of the Court of Appeals' denial of the petition for writ of mandamus. *Calderon v. Bean*, 520 U.S. 1204 (1997).

On June 30, 1997, the district court adopted the magistrate judge's findings, including that of ineffective assistance of counsel at the penalty phase and rejecting only the findings of prejudicial bailiff misconduct and prejudicial joinder. Accordingly, Bean's petition for writ of habeas corpus was denied as to guilt and granted as to penalty, and the death sentence was vacated.

The State filed a timely notice of appeal on August 20, 1997, and Bean filed a notice of cross-appeal on August 27, 1997.

On December 15, 1998, after briefing and argument, the Court of Appeals affirmed the district court's decision in all respects with the exception of the issue of joinder, as to which the Court of Appeals found that joinder rendered the conviction in the Fox case fundamentally unfair. The Court of Appeals remanded the case to the district court for entry of an order for retrial as to the Fox case and resentencing as to the Schatz convictions.

The State's petition for rehearing and suggestion for rehearing en banc was denied on March 2, 1999.

SUMMARY OF ARGUMENT

The grounds asserted by the State to support grant of certiorari are insufficient in light of the Rules of this Court to support review of the legally and factually adequate decision of the Court of Appeals.

First, the State argues that both the severance and the ineffective assistance of counsel portions of the Court of Appeals' decision "conflict with and misapply" other decisions of the Ninth Circuit. Petition, at 8. Even assuming this assertion had any basis in fact, which it does not, there is no ground to be found in Rule 10 of this Court for a petition to be granted to attempt to reconcile decisions within a Circuit, as opposed to conflicts between Circuits. The proper procedural mechanism for attempting such intra-Circuit reconciliation is a Petition for Rehearing and Suggestion for Rehearing En Banc, thereby permitting the entire appeals court to resolve any conflict between two or more of its decisions. *See* FRAP 35, 40. The State sought such review, and on March 2, 1999, the petition for rehearing was denied and the suggestion for rehearing en banc was rejected. Notably, "[t]he full court [was] advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it." Appendix B.

Second, the State asserts that the Court of Appeals overlooked "important facts" in rendering its decision that Bean was denied effective assistance of counsel in the penalty phase of his capital murder trial. Petition, at 8. Again, assuming this assertion had a basis in fact, which it does not, Rule 10 is explicit in its statement that a petition "is rarely

granted when the asserted error consists of erroneous factual findings." A petition for rehearing by the appellate panel is the appropriate vehicle for considering facts or law "overlooked or misapprehended. . . ." FRAP 40. In asserting that the appeals court "overlooked" facts, the State in essence argues that certiorari should be granted to evaluate the factual finding of that Court without any showing that this case is sufficiently extraordinary to support a departure from the general rule against review on this ground. Moreover, in this case, the Court of Appeals was not reviewing facts in a vacuum, but affirmed the district court's ruling which upheld the detailed factual findings of a magistrate judge following an evidentiary hearing.

Third, the State asserts that the Court of Appeals' holding that the joinder of two wholly separate and unrelated counts of murder violates due process "ignores" state court findings and determinations, at least implying that the federal court ignored state court factfindings, which it did not (as there were none), disregarded state court determinations of state law, which it did not (since it relied solely on federal constitutional law) and/or that it failed to defer absolutely to the state court's determination that there was no federal due process violation, which it was not required to do.

Finally, the State argues that this case presents an important question affecting "the most basic aspects of federalism, with especially far-reaching impact on State death penalty judgments." Petition, at 8. By this statement, the State presumably refers to its argument that the Court of Appeals' failure to uphold the state's procedural default rules was erroneous. This argument is completely specious since the claims upon which relief was granted were not procedurally barred.

To grant this Petition, based upon the grounds asserted by the State, would suggest that the Writ of Certiorari is available to any litigant disgruntled by the decisions he or she received below. That has never been the purpose of the Writ and the State's attempt to elevate its arguments beyond their apparent worth should be rejected.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' HOLDING REGARDING JOINDER WAS CORRECT

The Court of Appeals determined that the joinder of two murder cases for trial violated due process where the evidence was not cross-admissible, the prosecutor repeatedly encouraged the jury to consider the two sets of charges in concert, and the trial court's instructions failed to ensure that the jury compartmentalized the evidence of the two crimes. The standard applied by the Court of Appeals to arrive at its decision was whether trial of the two offenses simultaneously rendered Bean's trial "fundamentally unfair." App. A, at 22-23. The State does not dispute the legal standard used by the Court of Appeals, *see* Petition, at 12, but rather challenges the decision on the ground that Bean was unable to show prejudice as a result of the joint trial of the two crimes. *Id.* To rely on this assertion of no prejudice, however, the State ignores both the trial record and the applicable law.

The decisions interpreting California Penal Code section 954, which at the time of Bean's trial permitted joinder of two or more

different offenses for trial,[3] found that joinder was favored in California so long as the evidence of each of the joined crimes would be, to some reasonable degree, cross-admissible with regard to the other. *Walker v. Superior Court*, 37 Cal.App.3d 938, 943, 112 Cal.Rptr. 767 (1974). At the same time, cross-admissibility was limited in substantial part to situations in which evidence regarding one crime tended to establish intent, guilty knowledge, motive, or a common scheme, plan or design with regard to the other. *People v. Haston*, 69 Cal.2d 233, 236, 70 Cal.Rptr. 419 (1968).

The trial court denied Bean's motion for severance of counts, finding that the two cases were, in fact, substantially similar and that the evidence as to each crime was therefore cross-admissible. The trial court further believed it could cure any potential prejudice that might result from joinder by jury instruction. App. A, at 21.

The California Supreme Court, however, determined that the trial court had erred in finding cross-admissibility, holding that the crimes had little, if any, similarity, and that the evidence of one would not be cross-admissible as to the other. *People v. Bean, supra*, 46 Cal.3d

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[3] California Penal Code section 954 provided, in principal part that:

> [a]n accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offenses or two or more different offenses of the same class of crimes or offenses under separate counts . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately.

In Bean's case the basis for joinder was that the separate counts charged the same class of crimes or offenses.

at 938. Nevertheless, the Court ruled that joinder did not require reversal, relying on two factors: (1) that neither set of offenses was more inflammatory than the other; and (2) the state received "significant" benefits from joinder. *Id.* at 939-40; *see* App. A, at 22.

The facts of the Schatz case were, indeed, much more inflammatory than those in the Fox case. The Schatz case, according to the prosecution, involved the late night entry of an inhabited mobile home by two men, which resulted in the killing of a woman by multiple blows to the head with a ball peen hammer and injury to her husband with the same instrumentality. *People v. Bean, supra*, 46 Cal.3d at 929-30. What happened in the Fox case is much less clear. Ms. Fox apparently died of a heart attack after being assaulted as she arrived home from shopping. *Id.* at 931. The assault did not involve a weapon and was insufficient by itself to have caused her death. In fact, the coroner who examined Ms. Fox agreed that all of the head injuries Ms. Fox suffered, except for one to her ear, were consistent with an unbroken fall. RT 1918-19, 1978-79.

In addition, the evidence against Bean in the Schatz case was substantially stronger than that in the Fox case. In Schatz, it was undisputed that Bean's fingerprints were found on a screen that had been removed from the kitchen window of the Schatz's mobile home, and his partial palm print was discovered on the edge of the kitchen counter, *People v. Bean, supra*, 46 Cal.3d at 930-31, thus, placing Bean at the scene of the crime. In addition, two witnesses testified that Bean admitted to beating and killing Ms. Schatz. *Id.* By contrast, in the Fox case, the prosecution offered evidence that an overlay of a fingerprint on a pair of sunglasses found at the scene could be identified as that of

Bean. This identification was strongly disputed by defense experts. *Id.* at 932. The only other evidence connecting Bean to the Fox offense was the identification of Bean by Ms. Fox's neighbor who testified that she had seen Bean in the park across the street from her home on three occasions, three weeks earlier. *Id.*

The Court of Appeals determined that "prejudice resulted from the disparity between the evidence supporting [Bean's] guilt of the Schatz crimes and the proof of his guilt of the Fox offenses." App. A, at 24. The Court recognized that the "strong evidence of Bean's guilt in the Schatz crimes tainted the jury's consideration of Bean's complicity in the Fox offenses." App. A, at 24.

Under federal due process law,[4] there is no question that joinder is improper and prejudicial unless the evidence as to the joined matters is cross-admissible, *United States v. Johnson*, 820 F.2d 1065, 1070 (9th Cir. 1987); *Wharton-El v. Nix*, 38 F.3d 372, 375 (8th Cir. 1994), *cert. denied* 513 U.S. 1162 (1995), except in those cases where specific instructions are given to avoid the prejudice. *United States v. Lane*, 474 U.S. 438, 450 (1986); *Featherstone v. Estelle*, 948 F.2d 1497, 1502-1503 (1991). Further, whereas the California Supreme Court noted the specific benefit of economy to weigh in favor of joinder, *People v. Bean, supra*, 46 Cal.3d at 939-940, the federal Circuit Courts disagree.

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[4] While review of severance decisions within the federal system involves application of a "manifestly prejudicial" standard, *see United States v. Lewis*, 787 F.2d 1318, 1321 (9th Cir.), *amended* 798 F.2d 1250 (9th Cir. 1986), those involving review of state court trials apply the "fundamental fairness" standard. *Featherstone v. Estelle, supra.* An analysis of the two lines of cases, however, discloses that the two standards are essentially the same in their analysis and so cases involving both standards will be cited interchangeably in this Opposition Brief.

In *United States v. Foutz*, 540 F.2d 733, 736, 738 (4th Cir. 1976), the Fourth Circuit Court of Appeals recognized that when the evidence in a joined case is not cross-admissible, the only saving effected by joinder was to the burden placed on the prosecution. Similarly, the District of Columbia Court of Appeals has said that claims of judicial economy cannot overcome the clear infringement of a defendant's right to a fair trial that results from joining two charges that bear no logical relationship one to the other. *United States v. Nicely*, 922 F.2d 850, 860-861 (D.C.Cir. 1991). *See also Panzavecchia v. Wainwright*, 658 F.2d 337, 341 (5th Cir. 1981).[5] These conclusions logically flow from the indisputable observation the Second Circuit made in *Herring v. Meachum*, 11 F.3d 374, 377 (2nd Cir. 1993), *cert. denied* ___ U.S. ___, 114 S.Ct. 1629 (1994), that "juries are apt to regard with a more jaundiced eye a person charged with two crimes than a person charged with one." *Id., quoting United States v. Werner*, 620 F.2d 922 (2nd Cir. 1980).

The federal courts, however, have upheld convictions in cases where joinder was effected despite the absence of cross-admissibility where the trial court took meaningful affirmative steps to insure that there was neither cross-consideration of the evidence nor a conviction based solely on character, by giving explicit instructions on the issue. *See United States v. VonWillie*, 59 F.3d 922, 931 (9th Cir. 1995); *Herring v. Meachum, supra*, 11 F.3d at 378. Accordingly, the Court of Appeals in this case was "mindful that prejudice generally does not arise

[5] Conversely, when the evidence is cross-admissible, there can be no question of improper joinder. *United States v. Disla*, 805 F.2d 1340, 1353 (9th Cir. 1986); *United States v. Irvine*, 756 F.2d 708, 712 (9th Cir. 1985).

from joinder when the evidence of each crime is simple and distinct, even in the absence of cross-admissibility," noting that "[t]his determination hinges on the assumption that, if properly instructed, a jury can compartmentalize the evidence, rather than considering it cumulatively . . . ." *Id.*

In this case, however, there can be no doubt that the fundamental unfairness required for reversal was present. First, it is clear that the jury was not likely to have compartmentalized the evidence of the two crimes in light of the trial court's holding of cross-admissibility, which permitted the prosecutor to argue repeatedly that the two cases reflected Bean's "modus operandi," and urged the jury to consider facts from the Schatz case to bolster the thin evidence presented in the Fox case. App. A, at 21, 23.

Neither did the trial court take any steps to diminish the prejudice to which Bean was exposed.[6] While that court generally instructed the jury of its duty to decide each count separately, Petition, at 14, such an instruction did not in any way limit the jury's consideration of the evidence, but merely required the jury to determine explicitly guilt or innocence of each charge. This is in contrast to curative instructions that have been found sufficient to overcome prejudice of joinder. *See e.g., Herring v. Meachum, supra*, 11 F.3d at 378 (jury instructed "that evidence of one murder was not to be used to determine petitioner's guilt with respect to the other."); *see also, United States v. VonWillie, supra*, 49 F.3d at 930 (government agreed not to

[6] This failure is not, of course, surprising, in light of the trial court's erroneous determination that the evidence was cross-admissible.

focus on defendant's prior felony conviction beyond that required by defendant's reference to the issue and the court gave limiting instructions both when the potentially prejudicial evidence was admitted and when the jury was ultimately charged).

As the Ninth Circuit noted in deciding the instant matter, the trial court not only failed to instruct the jury that it could not consider evidence regarding one set of offenses as evidence of the commission of the others, any such admonition would have conflicted with the trial court's earlier conclusion of similarity as well as the prosecutor's repeated "modus operandi" arguments. App. A, at 23-24. *See also United States v. Lewis*, *supra*, 787 F.2d at 1322.

Finally, the State fails to mention that it conceded the absence of cross-admissibility, the lack of a common modus operandi, and the possible prejudicial effect of the joinder in argument before the Court of Appeals. App. A, at 26. Thus, as the Court of Appeals noted, the State's argument is the equivalent of arguing that joinder can never constitute a constitutional threat and is proper in all cases based solely on convenience! *Id.*

In light of the foregoing, certiorari should be denied on this issue both because it does not meet the criteria for that remedy and because any grant of the Writ would be futile and wasteful of the Court's limited resources in light of the record below.

II.

THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S HOLDING THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE WAS BASED ON DETAILED FACTUAL FINDINGS OF THE LOWER COURT AND ON WELL ESTABLISHED LEGAL PRINCIPLES

During an eight-day evidentiary hearing, Bean established that his two trial counsel rendered ineffective assistance at the penalty phase of his capital trial. Bean showed that his lawyers failed to undertake any meaningful investigation of his background, and that their extremely cursory presentation of lay witnesses was devoid of mitigating substance. In addition, Bean demonstrated that the testimony of his two mental health experts was limited, inconsistent, and poorly presented, and it was marred by lack of adequate preparation and the failure to obtain relevant facts concerning Bean's childhood and background. Because of counsel's inadequate performance, the jury which sentenced Bean to death was never informed of his abusive and deprived childhood, that he resorted to drugs to cope with his traumatic upbringing and mental health symptoms, or that he had a remarkably tragic family history replete with mental illness, poverty, substance abuse and domestic violence.

The magistrate judge issued detailed factual findings, and recommended that the district court grant habeas relief as to Bean's death sentence. The magistrate judge found that trial counsel had rendered ineffective assistance at the penalty phase by failing adequately to investigate and to present a case in mitigation. App. A, at 10. The

district court upheld the magistrate judge's findings and entered judgment vacating Bean's death sentence. *Id.* at 11.

The Court of Appeals agreed with the lower court, stating that "Bean's penalty-phase defense was disorganized and cursory" and that "[t]he two attorneys' confusion over their respective roles exacerbated deficiencies in the development of mitigating evidence." App. A, at 12. As the Court of Appeals acknowledged, counsel failed to follow the recommendations of mental health experts for testing until the weekend immediately preceding the penalty phase. Thus, Bean's counsel were unaware of the results of that testing when the penalty phase began. *Id.* at 13. Bean's counsel also failed to furnish other necessary information requested by the experts and failed to prepare them adequately to testify. "In sum, the penalty phase defense was at best woefully ineffective; at worst deleterious." App. A, at 13.

The State contends that the Court of Appeals employed a "new test" for reviewing the constitutional competency of counsel thereby requiring the State to show "flawless" performance of counsel to pass constitutional muster. Petition, at 15. It is clear from a review of the Court of Appeals' opinion, which, as discussed above, affirmed the well-considered findings of a magistrate judge who conducted an evidentiary hearing and a district court judge who upheld those findings, that it has found counsel ineffective under the well-established standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), which is cited on pages 12, 15, 16, 17 and 18 of the Court of Appeals' decision.[7]

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[7] Notably, the Court of Appeals did not find ineffective assistance at the guilt phase despite counsel's failure to investigate potential defenses and to interview key witnesses. App. A, at 18-20. If the Ninth Circuit was indeed adopting

(footnote continued on next page)

Actually it is the State that is arguing for a new standard to analyze ineffective assistance claims, contending that counsel was not constitutionally deficient because although flawed, their performance was not a "total absence of advocacy" amounting to no representation at all. Petition, at 19, *citing Clabourne v. Lewis*, 64 F.3d 1373, 1387 (9th Cir. 1995). In any event, the performance of counsel was more than merely flawed. According to the magistrate judge, (1) the pretrial investigation into Bean's background was "sketchy," "superficial," and "inadequately developed for purposes of the penalty phase," F&R, at 59, 60; (2) there was a lack of follow up to important requests medical experts made of trial counsel, F&R, at 58; (3) there was confusion as to the defense attorneys' roles in the penalty phase, F&R, at 58; (4) the penalty phase consisted of a themeless presentation, F&R, at 58; (5) the defense presented "very limited family/friends testimony" the purpose of which was "not apparent," F&R, at 61; (6) expert testimony presented by the defense was minimal, unpersuasive and an undeveloped "patch job," F&R, at 62, 68; and (7) closing arguments by both defense counsel were contradictory, did not have "much to say," and were "seriously hobbled by the lack of directed evidence put on in the penalty phase." F&R, at 58, 63. In sum, "from the preparation stage, through the presentation, to the closing, [Bean] did not receive effective assistance of counsel." F&R, at 63.

The district court agreed, finding the failure to prepare for the penalty phase until the guilt phase was over, combined with confusion

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a new test that required a flawless performance from counsel, the Court would have found ineffective assistance at the guilt phase as well.

over the respective roles of the two attorneys appointed to represent Bean and the lack of a minimally adequate investigation into Bean's background, resulted in an abysmally superficial presentation in which defense counsel conceded in his opening statement that "the evidence that we will present . . . won't be very much," RT 4310, and concluded in his closing argument "I don't have a lot of good factors that you can relate to." RT 4738; Judgment and Order, July 22, 1997.

The State next argues that the Court of Appeals failed to give due deference to the California Supreme Court's appellate decision on ineffective assistance of counsel. Petition, at 16. The State seriously misrepresents the state court record in citing to the California Supreme Court's opinion on direct appeal and stating that the court was "ultimately satisfied that trial counsels' performance met the constitutional standard . . . ." Petition, at 16. Even to assert this argument required the State to manufacture factual findings and to take language in the California Supreme Court opinion on direct appeal completely out of context.

On direct appeal, Bean raised a record-based claim that trial counsel was ineffective for failing to investigate a mental state defense at the guilt phase. The California Supreme Court denied the claim because the trial record was insufficient to prove Bean's claim. In so doing, the court held that the trial record neither confirms defendant's assertion that counsel failed to investigate or consider such a defense, nor did it suggest what evidence might have been obtained had counsel undertaken further cross-examination of witnesses. *People v. Bean, supra*, 46 Cal.3d at 944. The court advised, given that the scope of the appeal is limited to the trial record, that an appellant who claims to have

been denied constitutionally adequate assistance may seek relief through a collateral attack on the judgment where matters outside the record can be referenced. *Id.* Nothing in the California Supreme Court's opinion pertains to penalty phase ineffective assistance, and even if it did, it would have minimal relevance since none of the facts established at the federal evidentiary hearing in support of Bean's claim were before the court on direct appeal. The California Supreme Court denied Bean's penalty phase ineffective assistance claim, raised in the subsequently filed habeas corpus petition, on the merits, without a hearing or the issuance of an opinion. Contrary to the State's grossly misleading assertion, there are simply no factual findings to which to defer.

The State cites the testimony of the two mental health experts, Dr. Weissman and Dr. Blunt, who testified on Bean's behalf at the penalty phase, in support of its contention that counsel's performance was constitutionally adequate. Petition, at 16-17. On the contrary, despite "abundant" mental state evidence presented at the evidentiary hearing which established that Bean was "functionally mentally retarded; that he suffered from post-traumatic stress disorder, 'based upon his childhood experiences; that he was brain-damaged . . .," App. A, at 14, Bean's mental health experts provided equivocal and contradictory testimony at trial. The State's summary of the mental state evidence masks how disorganized, poorly presented and ultimately meaningless this testimony was.

Counsel failed to prepare Dr. Weissman to testify and failed to provide him with records that he requested. As a result, he "could not definitively opine whether Bean had suffered from brain damage and whether Bean was able to appreciate the criminality of his conduct, but

could merely testify that Bean suffered from an organic personality disorder and was moderately defective in intelligence." *Id.* at 13. He testified that "he could not be certain of [Bean's] problems without further development. *Id.* at 17. Dr. Blunt, who testified on the basis of her last-minute neuropsychological testing without having reviewed any records or facts about the case, testified that Bean had moderate brain damage. However, as the magistrate judge concluded, "[h]er testimony was less than persuasive at best given this context, and a seeming artifice at worst." App. A, at 17.

The mental state testimony at trial was further compromised by counsel's incomprehensible failure to question Dr. Weissman about his consideration of Dr. Blunt's findings of brain damage. Counsel elicited testimony from Dr. Weissman that after examining Bean he reached a "clinical impression that suggested that he should be further examined ... for organic brain damage" but reached "no firm conclusion." RT 4547. Counsel did not, however, ask Dr. Weissman whether he had reviewed Dr. Blunt's findings that Bean suffered from brain damage, which would have solidified his findings of "soft signs" of brain damage, RT 4548, 4550, while, at the same time, corroborating Dr. Blunt's testimony. On cross examination, Dr. Weissman testified that, in fact, he had reviewed Dr. Blunt's report the day before he testified, RT 4570, and endorsed her findings of brain damage which were corroborative of his own. RT 4603. Because counsel failed to ask appropriate questions of Dr. Weissman on direct examination regarding his consideration of Dr. Blunt's findings, however, the prosecutor was able to undermine Dr. Weissman's ultimate conclusion that Bean suffered from brain damage during cross-examination. Dr. Weissman was forced to back off his

consideration of Dr. Blunt's report, since he had not indicated his reliance upon it when questioned by defense counsel, and ultimately he conceded that Bean's condition was "suggestive" only of organic brain damage. RT 4605.

This permitted the prosecutor to state in his closing argument that the evidence "falls short" of proving brain damage in that "Dr. Weissman, even after having the benefit of Dr. Blunt's findings, was finally, after much going back and forth, of the opinion that he had no opinion concerning Mr. Bean having organic brain damage. The best he could suggest was some soft signs of it, which he did not take pains to develop any further." RT 4722. Thus, the prosecutor pointed to a "disagreement" between Bean's two experts, and was able to obtain a jury instruction regarding resolution of conflicting expert testimony even though the only experts were defense experts. CT 1000.[8]

In addition, although Dr. Weissman testified that he could not render a credible opinion about Bean's mental state at the time of the crime in the absence of information about the crime, Dr. Blunt inexplicably said that she could, and testified that Bean was definitely impaired in his ability to appreciate the criminality of his conduct. *Id.* This created a further conflict between Bean's experts and permitted the prosecution to undermine the entirety of Dr. Blunt's testimony, RT 4668-4675, and to stress her lack of experience. RT 4722-25.

As the Court of Appeals concluded, "[t]hese two witnesses 'did

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[8] At the evidentiary hearing, both Dr. Weissman and Dr. Blunt agreed that had they been adequately prepared and provided with readily available information about Bean's social history and testing, they would have opined at trial that Bean had brain damage and was suffering from substantial physical, mental and emotional impairments. App. A, at 14.

little to aid in [Bean's] fight for life.'" App. A, at 17, *quoting Hendricks v. Calderon*, 70 F.3d 1032, 1044 (9th Cir. 1995), *cert. denied* ___ U.S. ___, 116 S.Ct. 1335 (1996).

The State next argues that certiorari should be granted because this case stands in "marked contrast" to other Ninth Circuit cases in which counsel was found to be ineffective for failing to present any mitigating evidence. Petition, at 17-19. In those cases, the State argues, relief was granted where no investigation was done and no mitigation was presented. Of course, certiorari is not an appropriate vehicle for resolving intra-Circuit conflicts. *See* United States Supreme Court Rule 10.

In any event, the State misreads Ninth Circuit authority. While the Ninth Circuit has certainly granted relief in cases where no investigation was done by counsel at the penalty phase and no mitigating evidence was presented, it is not true that only in such cases has ineffective assistance been found. For example, in *Hendricks v. Calderon, supra*, counsel presented the testimony of a clinical psychologist, the defendant, and another lay witness. Despite this presentation, counsel was found to be ineffective because the psychological testimony was not corroborated, the evidence presented was not connected to statutory mitigating factors, and counsel failed to discover and to present evidence regarding Hendricks' background of physical and sexual abuse. Id. at 1043-44. *Cf. Bloom v. Calderon*, 132 F.3d 1267 (9th Cir. 1997), *cert. denied* ___ U.S. ___, 118 S.Ct. 1856 (1998)(relief granted where trial counsel hired a psychiatric expert only days before trial to support his insanity defense and failed to provide expert with readily available information: "when the defense's only

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expert requests relevant information which is readily available, counsel inexplicably does not even attempt to provide it, and counsel then presents the expert's flawed testimony at trial, counsel's performance is deficient.").[9]

Next, the State argues that counsel and his investigator performed an adequate investigation by contacting various family members and friends but that these potential witnesses failed to disclose evidence of Bean's drug addiction, severely abusive upbringing and general inability to cope. Petition, at 19. The State thus attempts to blame Bean and Bean's family and friends for not disclosing evidence "that would have been helpful in developing a mental health profile." Petition, at 19. However, it was not that the people interviewed hid this information--they were never asked. As the State stipulated prior to the evidentiary hearing, "trial counsel did not seek or obtain information with regard to [Bean's] family history of mental illness, substance abuse, domestic violence and poverty," "did not seek or obtain information with regard to the psychological and physical abuse suffered by [Bean]," and "did not explicitly instruct his investigator to obtain mitigating evidence concerning whether [Bean] was physically, sexually or psychologically abused as a child, whether there was a family history of mental illness, poverty or deprivation, the extent and origin of [Bean's] mental impairments and learning deficits, and the basis for any substance abuse problems." Joint Pretrial Statement, Undisputed Facts.

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[9] The State's contention that this case is an aberration is further undermined by the fact that not one Ninth Circuit judge called for a vote to have the case reheard en banc. App. B.

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Moreover, as the district court held:

> Because the initial family and friends interviews were sketchy, they were insufficient to excuse counsel's failure to interview other persons. Not only was the scope of the interviews inadequately designed to elicit relevant mitigating information concerning [Bean]'s family history, but the persons interviewed ([Bean's] father, mother and sister) were those most likely to withhold such information.

Judgment and Order, July 22, 1997, at 5.

With regard to Bean's failure to disclose his abusive upbringing and other pertinent facts about his background, as all of the mental health experts, including those offered by the State, testified at the evidentiary hearing that minimization of one's drug use and denial of a traumatic childhood are extremely common, and a proper evaluation would not rely on the client for background information or substance abuse history. Nor is it reasonable to expect someone with the cognitive and communication deficits Bean indisputably suffered to have an awareness of or the capacity to articulate his impairments and brain damage or to recognize that such information was relevant to his trial.

Moreover, there was information readily available to defense counsel, including Bean's juvenile records, which, as the magistrate judge found, "would have spoken much about [Bean's] troubled childhood, and which would have supplied many leads for further investigation, [but] were not reviewed until after the guilt phase." F&R at 60. In addition, in trial counsel's investigator's interview of Joseph Boykin, a family friend, Mr. Boykin said that Bean's father "had been quite rough on Defendant in the past, and at one time may have been arrested for beating the Defendant." Evidentiary Hearing Exhibit 145. Such a significant revelation would have led competent counsel to

question others regarding child abuse and to present such evidence at trial. Here, the information was ignored. Finally, there was overwhelming evidence of Bean's drug use, both chronic and at the time of the crimes, that was readily available to trial counsel, and which, as is undisputed, trial counsel failed to investigate or pursue. Thus, despite counsel's cursory investigation, the defense did obtain rich clues to potential mitigating evidence, but counsel's inattention to the penalty phase led them to neglect those critical facts.

The State argues that even if counsel's performance were deficient, Bean failed to establish prejudice. It contends that while the jury did not hear graphic details of Bean's childhood, they were aware that he "spent time in juvenile detention, was beaten by his parents, and left home at 15." Petition, at 20. First, it is simply not true that the jury heard evidence that Bean was physically abused by his parents. To the contrary, despite readily available evidence that Bean was brutally beaten by his father on a regular basis, counsel elicited testimony from family and neighbors that Bean had a good relationship with his parents, and Bean's father gave unrebutted testimony that he never beat Bean. As the Ninth Circuit correctly stated, "[t]he jury that committed Bean to death had no knowledge of the indisputably sadistic treatment Bean received as a child, including repeated beatings that left a permanent indentation in his head." App. A, at 17.

Furthermore, the fact that Bean was placed in juvenile detention or left home at 15 years of age, particularly when there was no explanation of his background to explain and put in context why these events occurred, did not constitute mitigating evidence. Thus, Bean's mother testified that Bean had been made a ward of the juvenile court,

and had been sent to Boys' Ranch, RT 4353, but counsel was not aware, and therefore did not establish, that Bean was sent to juvenile facilities for stealing his father's guns because his father had threatened Bean and his siblings with them. Evidentiary Hearing Exhibit 62.

Similarly, while counsel elicited testimony from Bean's parents that Bean left home at the age of fifteen, RT 4353-54, because according to Bean's father, "he didn't want to do what I told him to do," RT 4373, counsel never presented testimony that the actual reason for leaving home was to avoid the violence visited upon him by his father. Having elicited such false and damaging testimony that Bean's father never beat Bean and that Bean was simply a recalcitrant and unruly child, it was particularly unreasonable and incompetent for counsel to fail to rebut such testimony. Because of counsel's failure to investigate Bean's childhood, he did not know of the readily available evidence of the brutal beatings Bean endured or that Bean fled his father's house to escape the brutality.

In addition, as discussed above, while two mental health experts testified at the penalty phase, "the experts' lack of preparation and the limited foundation for their conclusions severely limited their utility to Bean's penalty-phase defense." App. A at 16-17. Counsel's deficient performance was undoubtedly prejudicial in light of the fact that there was a substantial amount of readily available mitigating evidence that was not presented to the jury at any stage of the proceedings. Such evidence "has the potential to totally change the evidentiary picture." *Baxter v. Thomas*, 45 F.3d 1501, 1512 (11th Cir. 1995) *quoting Middleton v. Dugger*, 849 F.2d 491, 495 (11th Cir. 1988)). By contrast, the aggravating evidence presented by the prosecution was

minimal -- consisting of a 1979 burglary conviction and an altercation with two men in which Bean allegedly fired a sawed-off shotgun. *See* App. A, at 17.

That this was a close case is evidenced by the fact that the jury foreman notified the judge after two days of penalty phase deliberations that the jury was hopelessly deadlocked as to both murders and unable to reach a verdict. RT 4796; 4802. After being assured by the jury foreman that he held the opinion that the deadlock was hopeless, the court nonetheless sent the jurors home for the weekend, directing them to return to deliberations on the next Monday morning. RT 4802. The jury ultimately returned a death verdict for the Schatz murder and a life without parole verdict for the Fox murder.

The State argues that counsel's performance was not prejudicial in light of the disparate penalty jury verdicts as to the two murders. Petition, at 20. According to this reasoning, because the jury found death for only one of the murders, Bean was not prejudiced since a truly deficient performance would have resulted in two death verdicts. However, the very fact that the jury voted for life without parole as to one of the murders and was, in fact, deadlocked as to both murders for a period of time, despite the lack of compelling mitigation, demonstrates the closeness of the case and establishes that had counsel performed adequately it is reasonably probable that the outcome would have been different.

III.

THE CLAIMS UPON WHICH THE COURT OF APPEALS GRANTED RELIEF WERE NOT PROCEDURALLY DEFAULTED

The State contends that the claim upon which the district court granted relief, ineffective assistance of counsel, was procedurally barred and that a "manifest injustice" has resulted from the Ninth Circuit's refusal to honor the procedural bar. This Court has already denied certiorari on this issue in this case when the State sought review after Court of Appeals' denial of its petition for writ of mandate. *Calderon v. U.S. District Court for the Eastern District of California, supra.*[10] It should do so again.

In any event, Bean's ineffective assistance of counsel claim was not procedurally barred, but was considered on its merits by the California Supreme Court under an exception to California's timeliness default rules. The California Supreme Court, in its order denying the habeas petition, stated that it considered and rejected certain claims, including ineffective assistance of counsel (state claim XLIX), on the merits. Appendix C. In denying these claims, the California Supreme Court order cited specifically to pages 797-798 of its decision in *In re Clark*, 5 Cal.4th 750, *supra*. *Clark* purported to modify and clarify

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[10] The Ninth Circuit Court of Appeals' decision denying mandamus fully analyzed Petitioner's claims regarding the meaning and effect of California's procedural bars only because it was not yet clear at that stage of the litigation whether Bean would prevail on claims the California Supreme Court purported to default. On Appeal, the Ninth Circuit again rejected the State's contentions, relying on the law of the case. App. A, at 12. Since Bean prevailed only on non-defaulted claims, the issue should not even have been raised in this Petition.

various state procedural default rules. Pages 797-98 of the *Clark* opinion pertain to "exceptions to the procedural bar against successive or untimely petitions." *Id.* The Court stated that the "fundamental miscarriage of justice" exception to procedural bar is applied where the habeas petition alleges:

> (1) that the error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; [footnote omitted] (2) that the petitioner is actually innocent of the crime or crimes of which the petitioner was convicted; [footnote omitted] (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed a sentence of death; [footnote omitted] (4) that the petitioner was convicted or sentenced under an invalid statute.

Id.

It is abundantly clear from the California Supreme Court's citation to the exceptions enumerated in *Clark* when it denied the ineffective assistance of counsel claim on the merits, that whether or not the court determined that the petition was untimely, it applied its "miscarriage of justice" exception so as not to preclude review of Bean's ineffective assistance claim. The State's contention that this claim is procedurally barred is wholly meritless.

CONCLUSION

For the foregoing reasons, Respondent Anthony Cornell Bean respectfully requests that this Petition for Writ of Certiorari be denied.

Dated: June 29, 1999

Respectfully submitted,

ANDREA M. MILLER*
NAGELEY & MEREDITH, INC.
8001 Folsom Blvd., Suite 100
Sacramento, CA 95826
(916) 386-8282

ANDREW S. LOVE
LAW OFFICES OF COFFIN & LOVE
301 Pennsylvania Ave.
San Francisco, CA 94107
(415) 920-3705

Counsel for Respondent
ANTHONY CORNELL BEAN

* Counsel of Record